

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application  
regarding the Conversion and  
Acquisition of Control of Premera Blue  
Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER'S ORDER ON OIC  
STAFF'S MOTION FOR PROTECTIVE  
ORDER

This matter comes before me on the "OIC Staff's Motion for Protective Order," dated November 19, 2003. The OIC Staff requests that a Protective Order be entered for Bates-numbered documents LUN-00000427-428 and LUN-00000578-581, which it withheld from document production prior to the November 17, 2003 deposition of Joe Lundy. I have considered the OIC Staff's Motion and Premera's Response, dated November 21, 2003, both with attachments.

Assistant Attorney General Robert J. Fallis states in his November 18, 2003 declaration in support of the OIC Staff's Motion: He has been assigned to advise Attorney General Christine O. Gregoire in connection with her review under RCW 24.03.220-230 of Premera's plan for distribution of assets upon conversion. He has relied upon the law firm of Cantilo & Bennett, the Blackstone Group, and PriceWaterhouseCoopers as consultants to assist him in rendering legal advice to the Attorney General. Mr. Fallis' January 16, 2003 email to Andrew V. Taktajian of Cantilo & Bennett, captioned "TAX CALL," contained a discussion of legal theories relative to the review of the conversion, including certain structural aspects of the proposed foundation shareholder and charitable organization. The purpose of the email was to

request information necessary to provide appropriate legal advice to the Attorney General. The email is protected attorney work product and privileged attorney-client communication.

Premera contends: 1) Documents and information disclosed to a testifying expert, such as Mr. Lundy, in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report. 2) The OIC Staff has produced other email correspondence from Mr. Lundy's files apparently related to the withheld documents, thereby waiving any privilege that might otherwise exist.

*Discussion.*

This matter comes before me on an expedited briefing and ruling schedule, as agreed in a conference call on November 17, 2003. Under the circumstances, the parties' opportunity to brief the issues has been limited.

In the email to Mr. Taktajian that is primarily at issue, Mr. Fallis expresses his legal theories as to certain elements of the conversion transaction and asks pointed legal questions. The substance of the email is consistent with Mr. Fallis' representation that his communication with Mr. Taktajian was intended to assist him in rendering legal advice to the Attorney General related to her responsibility under RCW 24.03.220-.230 for approval of Premera's plan for distribution of assets. The Attorney General's statutory responsibility to consider the plan for distribution of assets is distinct from the Commissioner's statutory responsibility to consider the conversion transaction itself.

In this context, Mr. Fallis' communication was not that of counsel with testifying expert, but of counsel with a consultant necessary to represent the interests of the client

(here, the Attorney General in her special statutory role). As such, the emails are protected by the attorney-client privilege. (See discussion of the privilege in the “Special Master’s Decision Following In Camera Review of Documents,” at pages 4-6.)

The emails that Premera provided in support of its claim of waiver of privilege are essentially letters of transmittal, with little disclosure of substance. These emails should not reasonably be deemed to constitute a waiver of the privilege otherwise applicable to Mr. Fallis’ detailed substantive communication.

The OIC Staff’s Motion for Protective Order is granted.

DATED this 24<sup>th</sup> day of November, 2003.

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George Finkle  
Superior Court Judge, Retired  
Special Master